

## The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

10 TORREY GRAGG, on his own behalf and on )  
behalf of similarly situated persons, )  
11 Plaintiff, ) DEFENDANTS' NOTICE OF  
12 v. ) SUPPLEMENTAL AUTHORITY  
13 ORANGE CAB COMPANY, INC., a ) RE: PLAINTIFF'S MOTION FOR  
Washington corporation; and RIDECHARGE, ) SUMMARY JUDGMENT  
14 INC., a Delaware corporation d/b/a TAXI )  
MAGIC, )  
15 )  
16 Defendants. )

17 Defendants RideCharge, Inc. (d/b/a “TaxiMagic”) and Orange Cab Company, Inc. hereby  
18 submit this Notice of Supplemental Authority regarding Plaintiff’s pending Motion for Summary  
19 Judgment (Dkt. 151). Judge Coughenour’s unpublished order in *Agne v. Rain City Pizza, LLC*,  
20 No. C10-1139-JCC (W.D. Wash, filed June 17, 2011) [Dkt. 119] addressed and resolved the very  
21 same CEMA and CPA issues raised in Plaintiffs’ motion and Defendants’ opposition. A copy of  
22 Judge Coughenour’s order is attached as **Exhibit A**.

27      ///

DEFS.' NOTICE OF SUPPLEMENTAL AUTHORITY  
RE: PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT  
(No. C12-0577DSU) 1

Davis Wright Tremaine LLP  
LAW OFFICES  
Suite 2200  
1201 Third Avenue  
Seattle, WA 98101-3045  
206.622.3150 main • 206.757.7700 fax

1 DATED this 19th day of May, 2015.

2 DAVIS WRIGHT TREMAINE LLP  
3 Attorneys for Defendants

4 By: s/ James Harlan Corning  
5 Kenneth E. Payson, WSBA #26369  
6 Jaime Drozd Allen, WSBA #35742  
7 James Harlan Corning, WSBA #45177  
8 1201 Third Avenue, Suite 2200  
9 Seattle, WA 98101-3045  
10 Telephone: 206-622-3150  
11 Fax: 206-757-7700  
12 E-mail: kenpayson@dwt.com  
13 jaimeallen@dwt.com  
14 jamescorning@dwt.com

## **CERTIFICATE OF SERVICE**

I hereby certify that on this day, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

**Donald W. Heyrich**  
Email: [dheyrich@hkm.com](mailto:dheyrich@hkm.com)  
HKM Employment Attorneys, LLP  
600 Stewart Street, Suite 901  
Seattle WA 98101

**Albert H. Kirby**  
Email: [ahkirby@soundjustice.com](mailto:ahkirby@soundjustice.com)  
Sound Justice Law Group PLLC  
936 N. 34th St. Suite 300  
Seattle WA 98103

DATED this 19th day of May, 2015.

DAVIS WRIGHT TREMAINE LLP  
Attorneys for Defendants

By: s/ James Harlan Corning  
James Harlan Corning, WSBA #45177  
1201 Third Avenue, Suite 2200  
Seattle, Washington 98101-3045  
Telephone: (206) 622-3150  
Fax: (206) 757-7700  
E-mail: [jamescorning@dwt.com](mailto:jamescorning@dwt.com)

# **EXHIBIT A**

1 THE HONORABLE JOHN C. COUGHENOUR  
2  
3  
4  
5  
6

7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 MARIA AGNE,

11 Plaintiff,

12 v.

13 RAIN CITY PIZZA, L.L.C. et al.,

14 Defendants.

CASE NO. C10-1139-JCC

ORDER

15  
16 This matter comes before the Court on Defendants Papa John's USA, Inc., and Papa  
17 John's International, Inc.'s motion to dismiss (Dkt. No. 83); Defendants' Rain City Pizza L.L.C.,  
18 Edward Taliaferro, Kevin Sonneborn, and Rose City Pizza L.L.C.'s motion to dismiss (Dkt. No.  
19 84); Plaintiff's motion to compel (Dkt. No. 81); Papa John's motion for a stay of discovery (Dkt.  
20 No. 88); and the parties' various responses and replies (Dkt. Nos. 93, 97, 98, 99, 102, 106, 106,  
21 107, 108). Having thoroughly considered the parties' briefing and the relevant record, the Court  
22 finds oral argument unnecessary, grants Defendants' motions to dismiss, grants Plaintiff leave to  
23 amend, grants Defendants' motion to stay discovery, and denies Plaintiff's motion to compel.

24 **I. BACKGROUND**

25 Plaintiff seeks recovery under various state and federal statutes and common law for the  
26 alleged receipt of unsolicited commercial text or multimedia messages that Defendants sent to

1 her telephone. Plaintiff filed her putative class-action complaint alleging violations of the federal  
 2 Telephone Consumer Protection Act, Washington's Commercial Electronic Mail Act,  
 3 Washington's Automatic Dialing and Announcing Device Act, Washington's Consumer  
 4 Protection Act, and common-law negligence. Defendants contend that Plaintiff's complaint  
 5 pleads insufficient facts to state any claim for relief. They further argue that potential  
 6 amendments to the complaint would be futile because the law does not provide recovery for the  
 7 allegations. Defendants have also moved to stay discovery, and Plaintiff has moved to compel  
 8 discovery.

9 **II. DISCUSSION**

10 **A. Rule 8**

11 Rule 12(b)(6) allows a defendant to seek dismissal of a complaint that fails to state a  
 12 claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must  
 13 contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its  
 14 face.'" *Ashcroft v. Iqbal*, --- U.S. ---, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v.*  
 15 *Twombly*, 550 U.S. 544, 555 (2007)). A complaint has stated a claim "plausible on its face"  
 16 when it "pleads factual content that allows the court to draw the reasonable inference that the  
 17 defendant is liable for the misconduct alleged." *Id.* In reviewing Defendants' motion, then, the  
 18 Court accepts all factual allegations in the complaint as true and draws all reasonable inferences  
 19 from those facts in favor of Plaintiffs. *Al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009).  
 20 Although Rule 12(b)(6) does not require courts to assess the probability that a plaintiff will  
 21 eventually prevail, the allegations made in the complaint must cross "the line between possibility  
 22 and plausibility of 'entitlement to relief': if the facts are merely consistent with Defendants'  
 23 liability but cannot ground a reasonable inference that Defendants actually are liable, the motion  
 24 to dismiss will succeed. *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557). Moreover,  
 25 "[a]t least one *named* plaintiff must satisfy the actual injury component of standing in order to  
 26 seek relief on behalf of himself or the class." *Casey v. Lewis*, 4 F.3d 1516, 1519 (9th Cir. 1993).

1       The Court concludes that Plaintiff has not pleaded sufficient facts necessary to sustain  
 2 any asserted claims, primarily because Plaintiff omits necessary factual allegations regarding the  
 3 specific message or messages she received. In particular, Plaintiff's complaint provides a history  
 4 of telephonic communications, leading to short-message-service ("SMS" or commonly  
 5 understood as "text") messages as well as multimedia-service ("MSS") messages. Plaintiff  
 6 describes a broad array of the types of injuries that *may* result from receiving unsolicited  
 7 messages—increased data costs, loss of storage capacity, and invasion of privacy—and alleges  
 8 that Defendants sent these messages to thousands of people. Then, referring to the thousands of  
 9 messages allegedly sent to the putative class members, Plaintiff asserts with respect to herself  
 10 that "[t]hese messages played commercial solicitations upon the telephonic devices (e.g., cellular  
 11 telephones) of Representative Plaintiff, other residents of Washington State, and other persons in  
 12 the jurisdiction of the United States." (Dkt. No. 72 at 10). This allegation is the only Plaintiff-  
 13 specific allegation in the entire complaint.<sup>1</sup> It alone is insufficient to state a claim.

14       Although Rule 8 does not require that plaintiffs plead facts with particularity, Plaintiff's  
 15 bare factual allegation provides insufficient notice to Defendants regarding the message or  
 16 messages Plaintiff claims to have received. There is no allegation regarding how many messages  
 17 Plaintiff received. There is no allegation regarding when Plaintiff received the message or  
 18 messages. There is no allegation regarding what the message or messages contained. There is no  
 19 allegation regarding whether Plaintiff received only a visual text message or whether she  
 20 received multimedia messages, with audio and video. There is no allegation regarding the phone  
 21 number from which she received the message or messages. Plaintiff's complaint focuses on the  
 22 putative class, but it must first establish standing and sufficiently plead a claim for the named

23

24

---

25       <sup>1</sup> The complaint alleges that the messages generated sounds, vibrated the phone, played a video, and displayed text. (Dkt. No. 72 at 10). Yet the complaint does not differentiate between  
 26 the messages allegedly received by all the putative class members and those received by Plaintiff.

1 plaintiff. The purpose of Rule 8 is to provide a short and plain statement of the claim in order to  
 2 “give the defendant fair notice of what that claim is and the grounds upon which it rests.”  
 3 *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). At best, Plaintiff  
 4 alleges that at some unknown time at least one of the Defendants sent to her telephone an  
 5 unsolicited message. That type of bare allegation is insufficient to cross the line between  
 6 possibility and plausibility of entitlement to relief described in *Iqbal*. See *Abbas v. Selling*  
 7 *Source, LLC*, No. 09 CV 3413, 2009 WL 4884471, at \*2 (N.D. Ill. Dec. 14, 2009) (dismissing a  
 8 complaint for violations of the Telephone Consumer Protection Act of 1991 for nearly identical  
 9 reasons).

10       Nonetheless, the Court grants Plaintiff leave to amend her complaint. See *Schreiber*  
 11 *Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (“If a complaint is  
 12 dismissed for failure to state a claim, leave to amend should be granted unless the court  
 13 determines that the allegation of other facts consistent with the challenged pleading could not  
 14 possibly cure the deficiency.”).

15       **B. Telephone Consumer Protection Act**

16       The absence of specific facts regarding the message or messages Plaintiff allegedly  
 17 received is particularly important for the relief she seeks under federal and state statutory and  
 18 common law. In her amended complaint, Plaintiff must identify the specific facts that set forth  
 19 each distinct claim for relief.

20       For example, under her claim for violation of the Telephone Consumer Protection Act of  
 21 1991, Plaintiff must plead that Defendants sent unsolicited messages using an automatic  
 22 telephone dialing system specifically to Plaintiff’s phone service for which she was charged for  
 23 the message. See *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 950 (9th Cir. 2009); see  
 24 also *id.* at 952 (holding that a text message is a “call” within the meaning of the act); *Kramer v.*  
 25 *Autobytel, Inc.*, No. 10-cv-02722 CW, 2010 WL 5463116, at \*4 (N.D. Cal. Dec. 29, 2010) (“As  
 26 an isolated assertion, it is conclusory to allege that messages were sent ‘using equipment that,

1 upon information and belief, had the capacity to store or produce telephone numbers to be called,  
 2 using a random or sequential number generator.””).<sup>2</sup>

3 **C. Commercial Electronic Mail Act**

4 Plaintiff seeks monetary damages for alleged violations of Washington’s Commercial  
 5 Electronic Mail Act. *See* Wash. Rev. Cod. § 19.190.060 (“No person conducting business in the  
 6 state may initiate or assist in the transmission of an electronic commercial text message to a  
 7 telephone number assigned to a Washington resident for cellular telephone or pager service that  
 8 is equipped with short message capability or any similar capability allowing the transmission of  
 9 text messages.”). Section 19.190.040 states that damages for the receipt of improperly delivered  
 10 text messages are the greater of five hundred dollars or actual damages. Yet Washington  
 11 amended the statute to include section 19.190.090, which states that “[a] person who seeks  
 12 damages under this subsection may only bring an action against a person or entity that directly  
 13 violates RCW 19.190.080.” *Id.* § 19.190.090. Section 19.190.080 prohibits not the delivery of  
 14 commercial text messages but solicitation of “personally identifying information by means of a  
 15 web page, electronic mail message, or otherwise using the internet by representing oneself, either  
 16 directly or by implication, to be another person, without the authority or approval of such other  
 17 person.”

18 There is obvious tension between section 19.190.090, which limits a plaintiff’s ability to  
 19 pursue civil damages for improperly delivered text messages, and section 19.190.040, which  
 20 defines damages for the improperly delivered text messages as the greater of five hundred dollars  
 21 or actual damages. Nonetheless, the Court defers to the legislature’s most recent decision to

22

---

23       <sup>2</sup> Although Plaintiff cannot allege without factual support that Defendants used an  
 24 automatic telephone dialing system, Plaintiff also cannot reasonably know absent discovery  
 25 whether Defendants used such a device. Accordingly, the remaining facts alleged in the amended  
 26 complaint—particularly those surrounding the content and receipt of the message or messages—  
 must be sufficient for the Court to conclude that there is a plausible claim that Defendants used  
 an automatic telephone dialing system.

1 amend the statute—section 19.190.080—that explicitly limits recovery of monetary damages in  
 2 civil actions to situations involving the improper solicitation of personally identifying  
 3 information. *See Citizens for Clean Air v. City of Spokane*, 785 P.2d 447, 456 (Wash. 1990)  
 4 (“Generally, provisions of a specific more recent statute prevail in a conflict with a more general  
 5 predecessor.”); *Muije v. Dep’t of Soc. & Health Servs.*, 645 P.2d 1086, 1087 (Wash. 1982) (“We  
 6 adhere to the principle that provisions of a specific statute, such as the CSL, will prevail if there  
 7 is a conflict with provisions of a general statute, such as the APA, and the specific statute is  
 8 passed subsequent to the APA.”); 73 Am. Jur. 2d *Statutes* § 169 (2011) (“[W]here statutes are in  
 9 conflict, the one last enacted in point of time generally prevails, as being the latest expression of  
 10 the legislative intent. In fact, in this regard, it has been said that the general rule of statutory  
 11 interpretation is that a subsequent statutory provision prevails over a pre-existing and  
 12 irreconcilably conflicting provision which is not expressly repealed.” (footnotes omitted)).  
 13 Plaintiff’s complaint does not allege that Defendants asked for personally identifying  
 14 information, used the Internet, or represented themselves as another entity. Accordingly, the  
 15 Court dismisses Plaintiff’s second cause of action as pleaded.

16         However, Plaintiff may seek damages in her amended complaint using the Commercial  
 17 Electronic Mail Act as a per se violation of certain components of the Consumer Protection Act.  
 18 *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 536 (Wash.  
 19 1986) (“Where the Legislature specifically defines the exact relationship between a statute and  
 20 the CPA, this court will acknowledge that relationship.”). Specifically, § 19.190.060(2) states  
 21 that a violation of the provision prohibiting commercial-solicitation text messages vitally affects  
 22 the public interest for purposes of applying the Consumer Protection Act. The statute also  
 23 concludes that a violation “is an unfair or deceptive act in trade or commerce and an unfair  
 24 method of competition,” satisfying the first three elements of a successful Consumer Protection  
 25 Act claim. *See Hangman Ridge*, 719 P.2d at 539 (“The term ‘per se violation’ is thus imprecise.  
 26 It should be replaced by ‘per se public interest’ or ‘per se unfair trade practice’, depending upon

1 which element or elements are satisfied per se.”); 6A Wash. Prac., Wash. Pattern Jury Instr.: Civ.  
 2 310.01 notes on use (5th ed. 2011) (“If the first two or the first three propositions may be proved  
 3 by violation of a statute (for example, a Washington statute that makes a violation of that statute  
 4 a *per se* violation of the Consumer Protection Act), use WPI 310.03, Per Se Violation of  
 5 Consumer Protection Act.”); *id.* at 310.03. Whether Plaintiff is limited to actual damages with  
 6 the possibility for trebling, *see* Wash. Rev. Code § 19.86.090, or whether Plaintiff may recover  
 7 statutory damages via the Consumer Protection Act is an issue the Court need not address at this  
 8 juncture.

9                   **D. Washington’s Automatic Dialing and Announcing Device Act**

10 Plaintiff seeks relief for alleged violations of Washington’s Automatic Dialing and  
 11 Announcing Device Act. The act prohibits the use of an automatic dialing and announcing  
 12 device for the purposes of commercial solicitations. Wash. Rev. Code § 80.36.400. An automatic  
 13 dialing and announcing device is “a device which automatically dials telephone numbers and  
 14 plays a recorded message once a connection is made.” *Id.* § 80.36.400(1)(a). “Commercial  
 15 solicitation means the unsolicited initiation of a telephone conversation for the purpose of  
 16 encouraging a person to purchase property, goods, or services.” *Id.* § 80.36.400(1)(b).

17 Initially, there is no specific allegation in the complaint that Defendants used an  
 18 automatic dialing and announcing device to play a recorded message once a connection was  
 19 made to Plaintiff’s telephone. *See supra* Part II.A. Moreover, section 80.36.400 does not appear  
 20 to create a private cause of action; it provides only a *per se* violation of the Consumer Protection  
 21 Act. The Court therefore dismisses this cause of action as pleaded.

22 Although Plaintiff may file an amended complaint, she cannot plead a set of facts that  
 23 would entitle her to relief under the Automatic Dialing and Announcing Device Act. The plain  
 24 language of the statute prohibits the use of devices that play a recorded message once a  
 25 connection is made. Text messages, unlike traditional telephone calls contemplated in the statute,  
 26 do not play recorded messages; they merely display static words. And while multimedia

1 messages may play audio or video content, they do not play that content at the moment of  
 2 connection. Instead, at the moment of connection, the content is stored on the cellular phone,  
 3 awaiting the user's decision to play or delete the message.

4       Moreover, neither text nor multimedia messages initiate *telephone* conversations in the  
 5 same manner contemplated by the statute. Advances in cellular and computer technology  
 6 combined with commercial ingenuity have produced hand-held devices that today perform more  
 7 functions than the traditional telephone. Although businesses and consumers often refer to these  
 8 multiuse devices as "telephones," they are distinct from the telephones envisioned by the  
 9 Automatic Dialing and Announcing Device Act, enacted in 1986. Indeed, businesses and  
 10 consumers often distinguish "smart phones" from traditional telephones by referring to smart  
 11 phones as single devices that perform the function of several devices. One function smart phones  
 12 perform is traditional telephone service. Another, separate, function performed is text- and  
 13 multimedia-messaging service. The term "telephone conversation" as used in the Automatic  
 14 Dialing and Announcing Device Act is distinct from text and multimedia-messaging  
 15 conversations occurring through a multipurpose device, one function of which is traditional  
 16 telephone service.

17       In the setting of a traditional phone call, the recipient of a ringing telephone expects to  
 18 answer the call and hear<sup>3</sup> a live person on the other end of the line. Automatic dialing and  
 19 announcing devices trick the recipient into believing that a live person is on the telephone,  
 20 surreptitiously encouraging the recipient to answer the telephone. When the recorded message is  
 21 played, the recipient cannot immediately question the seller about the veracity of the claims as  
 22 expected. *See Wash. Rev. Code § 80.36.400, Leg. Finding 1986 c. 281 § 1* (explaining that  
 23 automatic and announcing devices used for commercial solicitation "[d]eprives consumers of the  
 24 opportunity to immediately question a seller about the veracity of their claims.") In the setting of

---

25  
 26       <sup>3</sup> A hearing-impaired individual may have a telephonic device that permits visual  
 connection upon answering the phone.

1 a text or multimedia message, however, the recipient does not “answer” the call in the same  
 2 manner, and the recipient is not similarly expecting to immediately converse with a live person  
 3 through traditional telephone communication.

4 The language of the Automatic Dialing and Announcing Device Act does not lend itself  
 5 to easy resolution of whether it covers commercial text and multimedia messages. Indeed,  
 6 applying the act to text and multimedia messages would achieve many of Washington’s  
 7 consumer-protection goals. But this Court should not stretch the meaning of the act to apply to  
 8 situations where Washington may easily address the situation; where Washington has permitted  
 9 the Utilities and Transportation Commission to adopt additional rules regulating automatic  
 10 dialing and announcing devices, Wash. Rev. Code § 80.36.400(4); and where Washington has  
 11 recently enacted a statute specifically designed to address commercial text messages. *See id.*  
 12 § 19.190.060.

13 Accordingly, the Court concludes that Plaintiff cannot state a claim under the Automatic  
 14 Dialing and Announcing Device Act.<sup>4</sup>

15 **E. Washington’s Consumer Protection Act**

16 Plaintiff has not met the *Twombly* and *Iqbal* standard of pleading sufficient facts to  
 17 sustain her asserted violation of the Consumer Protection Act. Without more facts regarding the  
 18 specific message or messages she received and the harm she allegedly suffered, Defendants have  
 19 not been put on sufficient notice of the claims against them. In particular, Plaintiff pleads only  
 20 that Defendants “engaged in unfair or deceptive acts and practices.” (Dkt. No. 72 at 18.) This  
 21 mere legal conclusion cannot withstand a *Twombly* and *Iqbal* challenge. However, Plaintiff may  
 22 be able to allege particular facts in an amended complaint to meet that standard. Moreover,  
 23 Plaintiff may also assert in an amended complaint a *per se* violation of the Consumer Protection  
 24

25 \_\_\_\_\_  
 26 <sup>4</sup> Even if the Court concluded that the terms of the statute were ambiguous, the legislative history of the Automatic Dialing and Announcing Device Act does not suggest that Washington intended to regulate commercial text and multimedia messages delivered to cellular telephones.

1 Act via the Commercial Electronic Mail Act.

2       **F. Negligence**

3       “[B]reach of a statutory duty is not negligence in and of itself, but rather is evidence of  
4 negligence.” *Mathis v. Ammons*, 928 P.2d 431, 435 (Wash. Ct. App. 1996). As explained earlier,  
5 Plaintiff’s complaint does not comply with *Twombly* and *Iqbal* and must be dismissed for failure  
6 to state a claim. Nonetheless, Plaintiff may be able to sufficiently plead in an amended complaint  
7 violations of certain federal and state statutes that support a claim for negligence. Plaintiff is also  
8 entitled to plead claims in the alternative. Although the negligence claim may be duplicative of  
9 her statutory claims, at this early stage in the litigation, the Court will allow the alternative  
10 claims to proceed in a sufficiently pleaded amended complaint.

11       **G. Individual Defendants**

12       The Court similarly dismisses the claims against Defendants Sonneborn and Taliaferro  
13 because the current complaint does not allege the facts stated in her opposition brief, namely,  
14 that these individuals acted under a false limited liability company and are personally liable as  
15 general partners. Nonetheless, Plaintiff may include these allegations in her amended complaint.

16       **III. CONCLUSION**

17       The complaint contains a significant amount of factual detail about the conduct affecting  
18 the putative class members, but it omits nearly all the necessary factual information regarding the  
19 named Plaintiff. Without allegations of specific facts regarding the message or messages  
20 received by Plaintiff, and without addressing the statutory issues described in this Order,  
21 Plaintiff’s action cannot proceed.

22       Accordingly, the Court GRANTS Defendants’ motions to dismiss (Dkt. Nos. 83, 84). The  
23 Court also GRANTS Defendants’ motion to stay discovery (Dkt. No. 88) and DENIES  
24 Plaintiff’s motion to compel (Dkt. No. 81) pending the filing of an amended complaint. The  
25 Court GRANTS Plaintiff leave to amend her complaint addressing the deficiencies described in  
26 this Order. Plaintiff may file an amended complaint no later than July 12, 2011.

1 DATED this 17th day of June 2011.  
2  
3  
4

John C. Coughenour  
UNITED STATES DISTRICT JUDGE